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In the Supreme Court of the United States

October Term 1974

No. 74-1527

RICHARD J. GOLDINGER, *Petitioner*

v.

BORON OIL COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Richard J. Goldinger prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in this case on March 7, 1975.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania granting a Motion for Summary Judgment in favor of Boron Oil Company, respondent herein, (A.p. 1a) is reported at 375 F.Supp. 400 (W.D. Pa. 1974). The *per curiam* affirmance of the district court by the United States Court of Appeals for the Third Circuit (A.p. 27a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 1975. This petition is filed within 90 days of the date of that judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Under its retail "commission manager" marketing program, a major oil company required its retail service station operators to (1) invest the necessary working capital; (2) assume the obligation of hiring and paying all employees at the station; and (3) assume substantial risks in connection with the conduct of retail operations. Does this marketing program violate §1 of the Sherman Act and §3 of the Clayton Act where the individual commission managers: (i) must sell gasoline and other products at prices set by the oil company, (ii) are required to purchase trading stamps with their own funds and to give such trading stamps to their retail customers, and (iii) may not sell competitive products?

STATUTORY PROVISIONS INVOLVED

15 U.S.C. §1. (SHERMAN ACT §1)

Every contract, combination . . . or conspiracy in restraint of trade or commerce among several states . . . is hereby declared to be illegal.

15 U.S.C. §14. (CLAYTON ACT §3)

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or

seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. §15 (CLAYTON ACT §4)

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This case involves a civil action for damages under the antitrust laws which was brought by Richard Goldinger, the petitioner herein, against the Boron Oil Company, the respondent herein, challenging the anticompetitive restraints imposed upon Mr. Goldinger as a commission manager service station operator for Boron Oil Company. On May 6, 1974 the United States District Court for the Western District of Pennsylvania granted a motion for summary judgment in favor of the defendant Boron Oil Company and denied plaintiff's cross motion for partial summary judgment. (A.p. 25a)*

A. Summary Of Proceedings

A complaint in three counts alleging a cause of action for damages under §1 of the Sherman Act and §3 of the Clayton

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* In this Petition references to the Appendix to this Petition are cited (A. p.). Most references in this Petition are to the Appendix filed with the Court of Appeals. These references are cited as (App. p.).

Act and alleging two common law theories of recovery had been filed September 18, 1972. Federal jurisdiction over Count I was invoked under 28 U.S.C. §1337. Following depositions of the plaintiff and the deposition of the marketing manager of the defendant, answers to interrogatories and production of documents, both parties filed motions under F.R.C.P. 56 in October, 1973. The district court denied plaintiff Goldinger's motion for partial summary judgment on the issue of liability and granted the defendant Boron Oil Company's motion for summary judgment on all three counts of the Complaint. A timely appeal was filed with the United States Court of Appeals for the Third Circuit on May 30, 1974. In that appeal, however, the plaintiff challenged only the action of the district court in granting summary judgment in favor of the defendant and in denying plaintiff's motion for partial summary judgment on Count I of the Complaint alleging violations of the antitrust laws. The plaintiff did not challenge the entry of summary judgment in favor of the defendant as to the common law allegations contained in Counts II and III of the Complaint. On March 7, 1975 the Court of Appeals for the Third Circuit affirmed the decision of the district court in a *per curiam* order without opinion.

B. The Nature of the Commission Manager Marketing System

The undisputed facts of this case are that Richard J. Goldinger entered into a contract with Boron Oil Company to operate a retail gasoline service station on May 26, 1966. (A.p. 28a et seq.) A subsequent similar agreement was entered into on May 1, 1969 (A.p. 34a et seq.)• which was

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• Since the Record is transmitted to this Court only upon granting the writ, petitioner is including the two commission manager agreements in the Appendix to this Petition.

continued until respondent terminated the relationship effective January 24, 1972.

The Commission Manager Agreements of the type signed by the petitioner are printed forms which are drafted and supplied by Boron. Identical agreements were required of virtually all of the operators of Boron's retail outlets.• Thus at the relevant time in question approximately 335 out of 340 of Boron's retail outlets located in Western Pennsylvania, Western New York State and West Virginia were controlled by these agreements. (App. p.112a) In terms of total volume in 1972, Boron supplied about 125 million gallons of gasoline to be sold to the public. (App. p.113a) In that same year Boron dealers marketed around 1.9 million dollars worth of tires, batteries and accessories (TBA) to the public. (App. pp. 120a-121a) All of the products supplied by Boron moved in interstate commerce. (App. pp. 109a-123a) Among its competitors in Western Pennsylvania, Boron ranked approximately third in the volume of retail gasoline sold. (App. p. 118a)

The Commission Manager Agreements (A.p. 28a et seq.), Boron Oil's internal memoranda (App. pp. 151a-152a) and the deposition of Robert H. Hughes, Division Sales Manager for the respondent Boron (App. p. 108a et seq.) establish the relationship which existed between Boron and its so-called commission managers. Basically, under the agreements the petitioner Richard Goldinger and the other 334 individuals who did business at Boron outlets received a commission on all gasoline and other Boron products sold. While minor changes were made from time to time, all Boron operators

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• It appears that Boron's retail marketing of gasoline underwent substantial change in 1973 shortly after the entry of a consent decree between Boron's parent company, Sohio, and the United States Government. *See, U. S. v. Standard Oil*, No. 74,475; *1973 Trade Cases* (unreported in Federal Supplement.)

paid all wages and payroll taxes for station employees, utilities, insurance and other expenses from the commission which he received. The balance, if any, together with net income from servicing vehicles and selling non-Boron products at the station represented the income of the plaintiff from conducting business at the station.

Before the petitioner or anyone else could take over a Boron station, his personal credit was investigated and evaluated. (App. pp. 126a-127a) It was necessary for the petitioner to have sufficient working capital available to pay his employees' wages for approximately six weeks (App. p. 128a) and the petitioner had to provide his own truck, if he used any, and small hand tools needed to service vehicles at the station (App. p. 129a). In addition to the investment required of the petitioner, he had the responsibility of hiring and paying employees (A. pp. 30a and 36a) and he assumed full risk of loss for damages to the premises and for all shortages or losses of monies or products consigned to the station (A.pp. 30a-31a and 37a). While the other obligations, expenses and risks assumed by the petitioner varied from time to time, both the 1966 and 1969 agreements contained express clauses consigning gasoline and other products to the petitioner (A.pp. 28a and 34a) and both agreements contained re-entry clauses and provisions for mandatory vacation of the premises in the event of termination (A.pp. 32a and 39a). Finally, in both agreements the respondent Boron disclaimed any responsibility for the obligations of the petitioner. (A.pp. 31a and 38a)

Notwithstanding petitioner's investment, responsibility and potential risk of loss from the operation of the service station, the respondent Boron Oil Company imposed significant restraints on the petitioner's ability to market gasoline and other products and even on the conduct of the service business at the station. First, petitioner was required

by the agreements to sell gasoline and other Boron products at the retail price set by Boron. (A.pp. 28a and 34a) Indeed, Boron set the price to be charged for customer service at the station (A.pp. 29a and 35a), even though the proceeds from such service work belonged solely to the petitioner. In addition to controlling retail prices, Boron imposed other restraints on petitioner's marketing of products. The petitioner was required to stock such Boron products as Boron selected from time to time and the petitioner was required to offer trading stamps and other promotional items at petitioner's expense as were directed by Boron Oil Company. (A.pp. 29a and 35a) These requirements were enforced. In addition to imposing requirements on the petitioner to stock and purchase items as directed by Boron, the agreements gave Boron a veto over petitioner's right to handle goods produced by others. Again, respondent enforced these provisions and specifically refused to permit petitioner and others to sell competitive motor oil, TBA and other products. (App. pp. 151a and 152a)

C. The Effect of the Commission Manager Marketing System

In addition to the fact that the Boron marketing arrangement imposed restraints on the petitioner, which in fact caused him harm, the record demonstrates that the Boron commission manager marketing system had a significant adverse effect upon competition. That effect can be seen by examining the deposition of Boron's Division Marketing Manager, Mr. Hughes.* The ultimate decision with respect to retail price moves at all commission manager

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* These portions of the Deposition of R. L. Hughes were not printed in the Appendix filed with the Court of Appeals but were called to the attention of the court in the briefs with the court. The citations are to the page in the Deposition of Mr. Hughes which is part of the record in this case.

stations was made at the home office of Boron in Cleveland. (Hughes Dep. pp. 21-23) The effect of this centralized control can be seen in the following passage from the transcript of the deposition:

"Q During the time that you were Division Manager, did Boron ever initiate price changes, other than in response to a deteriorating situation?

"A No.

"Q Do you recall any instances in which Boron lowered prices at any place within your division in an attempt to increase gallonage at any locations?

"A No.

"Q Did you at any time since you have been Division Manager ever receive instructions from your supervisors to either raise or lower prices within any part of your division?

"A I have received instructions to raise them.

"Q I take it you have not received instructions at any time to lower them?

"A That is right." (Hughes Dep. p. 24)

Thus under the commission manager marketing scheme Boron Oil controlled the prices at over 300 retail outlets without ever initiating a reduction in the price at which the public can buy gasoline.*

The same effect on a substantial amount of commerce exists with respect to the required purchase and use of trading stamps and the foreclosure from handling com-

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* This specific restraint caused harm to the petitioner who desired to be able to lower his price to meet competition from nearby outlets of other companies. (App. pp. 64a-65a, 73a-74a)

petitive oil or TBA items. At over 300 stations Boron shifted the financial burden of giving a discount in the form of trading stamps to operators like Mr. Goldinger, while maintaining its full margin on the gasoline sold through the station. It likewise foreclosed these 300 outlets to TBA and oil of competitors of Boron.

D. Termination of Petitioner As A Commission Manager

Notwithstanding the restrictions imposed on the petitioner, he increased the volume of business done at the station. In December, 1971 petitioner was directed to keep his station open on Christmas Day. He refused to do so and on January 24, 1972 his relationship as a Boron operator was terminated for this reason. This action challenging the marketing restrictions imposed upon the petitioner and challenging the petitioner's termination followed.

E. District Court Opinion Granting Summary Judgment

On the issue of whether an illegal price fixing agreement existed, the district court concluded that the petitioner was an employee of Boron Oil Company who could not enter into a price fixing agreement with his corporate employer. (A.p. 16a) While conceding that petitioner did have to make an investment in working capital and had to assume risks, this was viewed by the district court as being "not incompatible with a contract of employment." (A.p. 17a) In arriving at this conclusion the court stressed that the commission managers were not bound to remain at their stations and were free to terminate their relationship with Boron Oil Company. (A.p. 16a)

The provisions of the Commission Manager Agreement requiring that the operators purchase trading stamps and give them to their retail customers and the provisions

prohibiting commission managers from handling competitive TBA and oil were measured against the provisions of §3 of the Clayton Act. The district court concluded that since title to the products sold by the operators remained in Boron there was no tying arrangement. (A.p. 5a-6a) On this analysis the district court granted the motion for summary judgment filed by Boron Oil Company and denied petitioner's partial motion for summary judgment. (A.p. 25a)

F. Judgment of Court of Appeals

Believing that the district court's opinion was at variance with the antitrust laws, an appeal to the Court of Appeals was taken. Petitioner asked both that the summary judgment in favor of the defendant be reversed and that the district court be directed to enter a partial summary judgment in favor of the petitioner on the issue of liability under the antitrust laws. In affirming the judgment of the district court, the Court of Appeals adopted the opinion of the district court. (A.p. 27a)

REASONS FOR GRANTING THE WRIT

The opinion of the district court in this case, insofar as it deals with the issue of price fixing, flies in the face of settled decisions of this Court, particularly the decision of this Court in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). By permitting the coerced purchase and use of trading stamps out of the petitioner's own funds and by ignoring the foreclosure of competition engendered by the prohibition against handling competitive TBA and oil, the opinion fails to deal with the reality of the marketing scheme devised by the respondent. Such an opinion will only encourage further dampening of competition in the petroleum industry at the retail level at the very time when the national interest requires the encouragement of vigorous competition to assure that price increases arising from the energy crisis do

not become artificially high. Finally, by undermining the independence of commission managers the purposes of the Sherman Act, to promote vigorous competition and to encourage a political and social climate in which independent business units are preserved, will be frustrated.

A. The Opinion Of The Court Below Is In Conflict With Established Decisions Of This Court.

In determining the validity of a marketing scheme under the antitrust laws, this Court has consistently looked to the nature of the arrangement and to its actual impact on competition and has then examined the competitive realities of the scheme in light of the meaning and purpose of the antitrust laws. Numerous arrangements which this Court has assumed to be proper as a matter of private contract law have been struck down as violative of the antitrust laws.*

In *Simpson v. Union Oil Co.* this Court was confronted with a consignment marketing arrangement of a major oil company. It was argued that the service station operator was merely the agent of the oil company *(see, Simpson v. Union Oil Co.*, 162 F.Supp 746 (N.D.Calif. 1962)), that the operator had a guaranteed return on every gallon of gasoline sold, that he had knowingly entered into the relationship, and that he was free to go elsewhere.

In holding that the operator was entitled to have summary judgment entered in his favor on the issue of liability this Court emphasized:

> "To allow Union Oil to achieve price fixing in this vast distribution system through this "consignment"

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* Among these decisions are: *Dr. Miles Medical Co. v. John D. Parks & Sons, Inc.*, 220 U.S. 373 (1911); *Straus v. Victor Talking Machine Co.*, 243 U.S. 490 (1917); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1921); *United States v. Masonite Corp.*, 316 U.S. 265 (1942).

device would be to make legality for antitrust purposes turn on clever draftmanship. We refuse to let a matter so vital to a competitive system rest on such easy manipulation." 377 U.S. at 24

The district court in the present case erred by giving weight to the relatively minor differences in drafting between Boron's Commission Manager Plan and Union Oil Company's consignment plan.

The failure of the district court or the Third Circuit to apply *Simpson* to the present arrangement may be as a result of a misreliance on cases like *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952). Without regard to the particular label which one may use to describe the relationship between commission managers like the petitioner and Boron Oil Company, such commission managers are not in the category of top executives and decision making corporate employees who were referred to in *Nelson*. Indeed, as the district court did recognize, commission managers were required to make certain investments in the business and to bear risks of loss. Thus these commission managers are not "indistinguishable in function from agents or salesmen" with the meaning of *United States v. Arnold Schwinn & Co.*, 388 U.S. 363 (1967) esp. at 380-381 since Boron Oil has not retained full dominion or risk of loss with respect to the products sold at the commission manager's service stations. An agreement to fix prices between individuals possessing the independence of commission managers and the supplier would appear to be proscribed by the opinion of this Court in *Albrecht v. Herald Company*, 390 U.S. 145 (1968). *See, Tamaron Distributing Corp. et al. v. Weiner*, 418 F.2d 137 (7th Cir. 1969).

Likewise the district court opinion did not follow the controlling opinions of this Court in passing on the required

purchase and use of trading stamps and in reviewing the prohibition against selling competing TBA and oil. By requiring its operators to purchase trading stamps and then in turn give those trading stamps to customers, Boron Oil is forcing its commission managers to subsidize the giving of a discount. Such a requirement is clearly one which has the effect of tampering with the price structure for products sold through all Boron outlets. As such it is illegal. *U. S. v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940) esp. at 221. *See, U. S. v. Gasoline Retailers Associations, Inc.*, 285 F.2d 688 (7th Cir. 1961).

The prohibition in the Commission Manager Agreement against selling competitive products plainly constitutes "a contract for sale of goods . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not . . . deal in the goods . . . of a competitor.", CLAYTON ACT §3, 15 U.S.C. §14, as well as a "contract . . . in restraint of trade." SHERMAN ACT §1, 15 U.S.C. §1. While title to Boron stocked products is retained by Boron under the agreement, dominion over the products and the risk of loss has passed under the agreement to the commission manager. Under these circumstances the consignment device used by Boron Oil should no more be held to avoid the prohibitions of §3 of the Clayton Act than did the consignment device used in *Standard Fashion v. Magrane-Houston Co.*, 258 U.S. 346 (1922).

For whatever reason the district court and the court of appeals may have misapprehended the nature and effect of the commission manager marketing arrangement, it is apparent that the decision in this case is at variance with the consistent approach which this Court has taken toward such contrivances. While it is obvious that the Commission Manager Agreements have been skillfully drafted, it appears equally clear that Boron Oil Company has carefully

examined the prior decisions of this Court to devise a plan which is "adroitly modified on the one hand to take advantage, if possible, of distinctions suggested by these decisions, and, on the other hand, to evade certain supposed effects of them." *Straus v. Victor Talking Machine Co.*, 243 U.S. 490 (1917) at 498.

B. The Extent Of Antitrust Immunity Of Major Oil Companies To Market Under Commission Manager Arrangements Is A Question Of Great Public Importance Which Should Be Reviewed By This Court.

Where a question of great public importance is presented this Court has regularly granted certiorari to consider the question. In this case, it is submitted, that a determination must be made as to the nature and extent, if any, of the antitrust immunity enjoyed by the defendant and other companies to control the retail market for petroleum products under the type of commission manager plan under attack in this case.*

The maintenance and promotion of competition at the retail level of the gasoline distribution system is of continuing and mounting concern throughout this Nation. Much of the heightened attention has been precipitated by

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* The list of oil companies adopting commission manager plans includes, in part, Mobil Oil Corporation, Gulf Oil Corporation, Sohio, British Petroleum Oil Company and Boron, which account for approximately one-fifth of all retail sales of gasoline. A discussion of the use of the commission manager system and the entire problem of vertical integration into the retailing of gasoline is found in Hearings on the Market Performance and Competition in the Petroleum Industry Before the Committee on Interior and Insular Affairs of the United States Senate, No. 93-24 93rd Cong., 1st Sess. *esp.* at 535-542, 572-585. *See also*, Dept. of Treasury Staff Analysis, No. 93-18 (92-53 (1973), and 93 *Congressional Record* at S10300 *et seq.* (June 4, 1973).

substantial evidence indicating that the major oil companies are rapidly terminating large numbers of lessee-dealers and are unilaterally replacing them with company-dominated operations similar to Boron's arrangement with Mr. Goldinger. Although these new marketing policies differ somewhat in their specific contractual vagaries, the end result in each instance is to attempt to permit the major oil companies to completely dictate prices as well as to control the other related aspects of retail competition in the gasoline industry. Some experts predict that total vertical integration into retail marketing by major oil companies will occur. While a variety of sources have emphasized concern over this subject, it is succinctly expressed in the Conference Report, 93-628, on Senate Bill 1570. Therein, it is stated that:

> "The Committee wants to express its concern with the downstream vertical integration of the major oil companies into the distribution and retail levels of the market. Major oil companies have begun to market secondary brands through wholly-owned distribution subsidiaries. The primary brands are to an increasing extent being marketed through so-called salaried or managed retail outlets." (1973 U.S. Code Cong. and Admin. News at p. 2707)

Much of the consternation over this concentration of market power derives from the fact that these new marketing arrangements attempt to eliminate the independent businessman who effectively provoked not only intra-brand competition but also inter-brand competition as well. In light of this increased usage of company-controlled retail outlets, it is of considerable importance for this Court to review the impact of the Sherman and Clayton Acts upon the Boron marketing scheme.

Congress has expressed its will that competition, enforced by the antitrust laws, is needed during our present

energy crisis. Petroleum Allocation Act of 1973, P.L. 93-159, 87 Stat. 627, §§4(b)(1)(D) and (I) and §6(c)(1). While it may be that vertical integration in the retail market by company ownership of outlets which are operated by salaried employees cannot be reached by the antitrust laws, absent monopolization or predatory practices, this Court should decide whether such vertical control is permissible under the antitrust laws through the commission manager type of agreement where the retail operator must assume burdens of investment, entrepreneurial responsibilities such as hiring and paying employees, and risk of loss. The opinion of the court below gives license to the major oil companies to hasten their vertical control of retail outlets while minimizing their investment and risk in such locations. Free competition should not be so easily avoided.

C. The Restrictions Imposed Upon Commission Managers By Agreement Violate The Purposes Of The Antitrust Laws.

The restrictions imposed by Boron Oil Company upon the petitioner and hundreds of other operators will, if not overruled, encourage major oil companies to replace independent small-business service stations with more commission manager outlets to the detriment of both free and unfettered economic competition and the preservation of our democratic political and social institutions.

As this Court has observed:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress,

> while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958) at p. 4.

The free market of classical economics, designed to achieve optional use of our resources, ideally requires a relatively large number of sellers and of buyers, quick communication available to all participants of information respecting offered prices, quality and service, and no untoward barriers to entry to aspiring new risk-takers.

The Boron Oil Company's Commission Manager Agreements are clearly inimical to the above ideal. For instance, consumer retail price decisions are left in the single hand of the Company, not in the many hands of the hundreds of separate service station dealers; decisions respecting purchases of products such as tires, batteries and accessories are made solely by the Company, instead of the many possible different decisions of the hundreds of separate service station managers. Thus consumers are deprived of a variety of price and product choices; and many suppliers are deprived of possible service station customers for their products. Thus the assumed multiple decisions of the economic model of Adam Smith are replaced by the judgment of a few marketing executives contra to the design for economic liberty which was to be fundamentally supported by the Sherman and Clayton Acts.

But also there is the effect upon " . . . our democratic political and social institutions . . . ". 356 U.S. 1, 4. Independent business entrepreneurs, possibly local community leaders, are replaced by commission managers who must behave according to the dictates of absentee owners. "Then there is a serious loss of citizenship." *Standard Oil Co. of Calif. v. United States*, 337 U.S. 293, 319 (1949) (dissenting opinion of Mr. Justice Douglas).

As Judge Learned Hand reminded us, relying in part on important remarks in the legislative history by Senator Sherman himself, the antitrust laws have more than an economic purpose:

> "We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them. . . . Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States v. Aluminum Company of America*, 148 F.2d 416 (2nd Cir. 1945) at 428-429.

Boron Oil Company has devised a scheme under which the petitioner and hundreds of other commission managers have, as the district court recognized, been forced to make investments and bear risks of the business. Despite the assumption of these entrepreneurial risks, these commission managers have been deprived of the economic and other freedoms which the antitrust laws were designed to foster. Above all, the consuming public has been deprived of the benefits of unfettered price and product competition.

CONCLUSION

For the reasons stated the writ should be issued and the judgment of the United States Court of Appeals for the Third Circuit reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD J. GOLDINGER,
Plaintiff

v.

BORON OIL COMPANY,
Defendant

Civil Action No. 72-765

OPINION

WEBER, District Judge.

Plaintiff, whose contract with defendant to operate a retail gasoline service station was terminated effective January 24, 1972, has filed this complaint on causes of action which are all based on plaintiff's agreement with defendant to operate the retail gasoline station. Count I of the complaint alleges that such agreement was in violation of the antitrust laws of the United States, constituting a conspiracy to fix prices in violation of Sec. 1 of the Sherman Act, [15 U.S.C.A. §1], or a tying arrangement in violation of Sec. 1 of the Sherman Act, or Sec. 3 of the Clayton Act [15 U.S.C.A. § 14]. Jurisdiction of Count I is claimed under the antitrust laws of the United States.

In Counts II and III of the complaint, plaintiff asserts diversity jurisdiction and pleads causes of action arising out of the same contract. In Count II plaintiff claims that his discharge was unjustified because the contract between him and the defendant was unconscionable and void. Count III of the Complaint complains that his discharge was void because it was arbitrary and unreasonable. Plaintiff claims treble damages under Sec. 4 of the Clayton Act, 15 U.S.C.A.

§15, for the cause of action asserted under Count I, and compensatory damages for the causes of action asserted in Counts II and III of the Complaint.

Both the plaintiff and defendant have moved for summary judgment on all counts of plaintiff's complaint.

The evidentiary materials presented by the parties consist of a Commission Manager Agreement of May 26, 1966 and a subsequent similar agreement of May 1, 1969, which was in effect at the time of termination. The relationship between the parties was conducted under these agreements. Also proffered were equipment schedules, operating reports, plaintiff's income tax reports, correspondence, deposition testimony of plaintiff and of defendant's division manager, and a consent decree entered into a United States District Court in Ohio with related exhibits. While objection has been made to the admissibility of certain evidence proffered, which objections were considered herein with respect to the matters upon which the court made its findings, we are primarily concerned with the search for a genuine issue of material fact.

It would appear from this status of the record that as to all causes of action pleaded the parties are in agreement that there is no genuine issue of any material fact and that the issues can be determined as a question of law. While the parties in their briefs and arguments assert many conflicting inferences and conclusions to be drawn from the undisputed facts it does not appear to the court after a reveiw of the evidentiary material that there is a genuine issue of material fact between plaintiff and defendant.

PLAINTIFF'S COUNT I
THE ANTITRUST CAUSE OF ACTION

.A. *The tying arrangement allegation.*[Clayton Act, Sec. 3, Sherman Act, Sec. 1].

We find it appropriate first to consider plaintiff's allegation that the contract between him and the defendant consituted a tying agreement in violation of Sec. 3 of the Clayton Act. We do this because the price fixing allegation of Count I involves consideration of the same elements as are necessary for the determination of Counts II and III, plaintiff's status as an employee or an independent dealer. A tying arrangement has been defined as follows:

> "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." Northern Pacific Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 518, 2 L.Ed.2d 545 [1958].

We do not reach the question of lessening of commerce or restraint of trade unless and until the facts establish that a tying arrangement exists. Hunter Douglas Corp. v. Lando Products, Inc., 215 F.2d 372, 376 [9th Cir. 1954]; Allied Equipment Co. v. Weber Engineered Products, Inc., 237 F.2d 879, 883 [4th Cir. 1956]; Stokes Equipment Co. v. Otis Elevator Co., 340 F.Supp. 937, 940-941 [E.D.Pa.1972].

Paragraph 8 of plaintiff's complaint recites that "plaintiff was required by defendant not to deal in TBA products, (tires, batteries and accessories) greases, oils, lubricants and other goods, wares and merchandise other than those of defendant's choosing." Although it is not specifically averred in the complaint we assume from plaintiff's allegation of a contract with defendant with respect to a retail gasoline

station that the tying product was gasoline and that the tied products were the other ones mentioned in paragraph 8.

[1] It is essential in all tying cases under Sec. 3 of the Clayton Act that there must be a seller and a buyer or a lessor and a lessee and a tying and tied product, service or commodity. ("We need not discuss the respondent's further contention that the contract also violated §1 and §2 of the Sherman Act, for if it does not fall within the broader proscription of §3 of the Clayton Act it follows that it is not forbidden by those of the former." Tampa Electric Co. v. Nashville Coal, 365 U.S. 320, 335, 81 S. Ct. 623, 632, 5 L.Ed.2d 580 [1961]). Section 3 of the Clayton Act provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (15 U.S.C.A. §14).
>
> "Furthermore, there should be a clear statement of whether or not there were any tie-in sales. The oblique and incidental assumption regarding such 'alleged' sales in Finding 22, is not an acceptable substitute for a definite and forthright Finding of Fact." Hunter Douglas Corp. v. Lando Products, 215 F.2d 372, 376 [9th Cir. 1954],

and:

> "There can be no violation of the (Sec. 3 Clayton) Act unless there is a contract, sale or lease." Allied Equipment Co. v. Weber Engineered Prod. Co., 237 F.2d 879, 883 [4th Cir. 1956].

With these strictures in mind we must examine the nature of the business arrangement between the plaintiff and defendant. There is no allegation in the complaint that plaintiff purchased or was required to purchase or lease any product or property from the defendant. There is nothing in the evidentiary material including plaintiff's own deposition to show that he ever purchased or was required to purchase any product from the defendant except that plaintiff did purchase soap and towels for his gasoline station restrooms (not for resale), which he was under no obligation to purchase from defendant. The contract and the evidence show that the gasoline and other accessory products which were sold at retail in the gasoline station in question were supplied by the defendant to the station and title to this property remained in the defendant until it was sold to the retail consumer. The price at which the gasoline and other products were sold was determined by the defendant and the plaintiff received a flat rate commission per gallon on the sales of gasoline regardless of the price at which it might be sold but received a percentage of sales price commisssion on other products. Furthermore, the contract and the evidence show that there was no lease for the premises where plaintiff performed his services. The plaintiff was entrusted with custody of the retail gasoline station and the equipment of the defendant installed thereon without any requirement of rental or without a condition of occupancy for a fixed term.

A close examination of plaintiff's complaint reveals that there is no allegation that the plaintiff bought anything from the defendant or that he was required to buy anything from the defendant. Paragraph 8 of the complaint alleges that plaintiff was required by defendant not to deal in products other than those of defendant's choosing and paragraph 9 of

the complaint alleges that plaintiff was required to give trading stamps to retail customers and to participate in promotional and advertising programs. Neither paragraph expresses any allegation of a sale or lease of property between plaintiff and defendant. The plaintiff's own testimony on deposition recites that except for supplies of towels and soap, which the plaintiff purchased from defendant for use in the station and which he also purchased from suppliers other than defendant, plaintiff purchased no other goods, wares, merchandise, machinery, supplies, or other commodities from defendant in the years from 1966 to 1972.

Plaintiff relies on Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 84 S. Ct. 1051, 12 L.Ed.2d 98 [1964]. In that case the court considered the effects of an arrangement between a plaintiff dealer and the defendant oil company wherein goods were placed with the dealer on consignment and title never changed until the sale to the retail customer. The Court disregarded the contractual designation and looked at the substance of the transaction to determine its antitrust effect.

> "[T]he interests of the Government also frequently override agreements that private parties make. Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy." (p. 18).

However, we find on examination of *Simpson* that the court was dealing with a situation considerably different in its factual background from the present case. Simpson was recognized by the Court as an independent dealer. He leased the gasoline station from the defendant company for a fixed term. Under the agreement the defendant company consigned gasoline to Simpson, retaining title until the gasoline was sold to the retail customer. The defendant

company set the selling price for the gasoline. The plaintiff's profit from commisssions on sales was nevertheless geared to the rise or fall of the retail prices. The violation of the antitrust laws alleged by the plaintiff was a price fixing agreement. The Court commented upon the consignment arrangement as follows:

> "Dealers, like Simpson, are independent businessmen; and they have all or most of the indicia of entrepreneurs, except for price fixing. The risk of loss of the gasoline is on them, apart from Acts of God. Their return is affected by the rise and fall in the market price, their commissions declining as retail prices drop. Practically the only power they have to be wholly independent businessmen, whose service depends upon their own initiative and enterprise, is taken from them by the provision that they must sell their gasoline at prices fixed by Union Oil." (pp. 20, 21).

Simpson does not deal with tying agreements. While it will be necessary to examine *Simpson* further with respect to the present plaintiff's further allegation that the agreement between him and defendant constituted an illegal price-fixing arrangement, we cannot see how *Simpson* aids in our determination of whether the present agreement between plaintiff and defendant constitutes a tying arrangement. The plaintiff in *Simpson* had all of the aspects of an independent dealer and the court's recognition of plaintiff's independent status was a basic point of departure in its examination of the effect of the consignment arrangement.

[2] From all of the evidentiary materials presented we can find no basis for a finding that the contract between plaintiff and defendant bore any of the attributes of an illegal tying arrangement under Sec. 3 of the Clayton Act or Sec. 1 of the Sherman Act. There is no evidence which would cause the court on looking behind the form and language of

the agreement to conclude that despite the appearance of a contract of employment the agreement's actual effect was that of a tying agreement.

B. *The price-fixing allegation.* (Sherman Act, Sec. 1).

Section 1 of the Sherman Act, 15 U.S.C. §1 provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . . is declared to be illegal. . . .".

[3] Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition and agreements which create potential power for such price maintenance exhibited by its actual exertion for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 [1940].

Before any inquiry as to whether the documents before us are per se violations of the Sherman Act, or whether they have the effect of restraint of trade, the first and possibly decisive inquiry to which we address ourselves is the existence of an agreement, express or implied, between the parties hereto in violation of the Sherman Act.

There is no dispute that the prices of the products sold at the plaintiff's place of business were set by the defendant and that this control included not only those products which the defendant supplied for sale at this location, but the mechanical and repair services which were rendered by the plaintiff to customers at this establishment.

In paragraph 7 of his complaint plaintiff avers that he was "at all times relevant to this case an independent

businessman who was financially responsible for the results of the operation of the gasoline station mentioned above, had a sizable personal investment in such business, hired and fired his own employees, paid for his own insurance, did all of his own bookkeeping, ran his own service and repair business on the premises, and had the full risk of loss for any thefts or shortages of gasoline or other products procured from defendant."

It is the defendant's contention that plaintiff was not an independent businessman, but rather was defendant's employee, and that there can be no agreement or conspiracy in restraint of trade between a corporation and its employees.

[4] The nature of the relationship created between the parties by the Commission Manager Agreements and the practice or course of conduct between the parties under these agreements will be determinative of the relation between the parties and the application of the provision of Sec. 1 of the Sherman Act to that relationship. It is settled law that a corporation and its employees are not separate legal entities for the purpose of forming a conspiracy under the Sherman Act:

> "It is well established that a corporation cannot conspire with its officers, employees, and agents in restraint of trade within the meaning of the Sherman Act." Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 [5th Cir. 1969].
>
> "It takes two persons or entities to constitute a conspiracy and a corporation cannot conspire with itself. Since the officers, employees and agents of the corporation are considered a part of the corporation and their acts are the acts of the corporation, there can be no intracorporate conspiracy." Kendall Elevator Co.

v. L B C & W Assoc. of South Carolina, Inc., 350 F.Supp. 75, 78 [D.S.C.1972].

See also Goldlawr, Inc. v. Schubert, 276 F.2d 614 [3rd Cir. 1960], Johnston v. Baker, 445 F.2d 424 [3rd Cir. 1971], and Allen Organ Co. v. North American Rockwell Corp., 363 F.Supp. 1117, 1128-1129 [E.D.Pa.1973].

> "Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served, or the quality of goods to be produced do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act. Plaintiff can come within the meaning of Section 1 of the Act only by claiming the existence of a conspiracy, but no conspiracy could possibly exist under the facts disclosed." Nelson Radio & Supply Co. Inc. v. Motorola, Inc., 200 F.2d 911, 914 [5th Cir. 1952].

The basic documents which control the relationship between plaintiff and defendant are entitled "Commission Manager Agreement". There were two of these in effect during the period covered by the complaint and they are substantially similar. The changes in the provisions in the second contract shifted responsibility for certain items of operation costs, but otherwise the differences are not material to the determination of the question presented. The printed contract recites that:

> "*Employment.*
>
> Boron hereby employes Manager to operate Boron's Gasoline Service Station . . . and Manager hereby accepts such employemnt on the terms and conditions herein set forth."

Nevertheless, it is plaintiff's contention that the paper designation of "employment" in the Commission Manager Agreement is not controlling and that the court must look beyond the terms of the agreement when it was used to cloak antitrust violations. The plaintiff has recited matters disclosed in the evidence to support his contention that he was an independent dealer. These factual matters involve the amount of working capital which the plaintiff was obliged to invest initially as well as the working capital which he was required to keep invested in order to continue to operate the gasoline station as a Commission Manager. This capital requirement arose because the plaintiff was obliged to pay the certain day-to-day operating expenses of the station, including the wages of any employees for a period of six or seven weeks before he received his full commisssions on sales from defendant company. The commisssions were paid on all sales during a given month on the 25th day of the succeeding month. Plaintiff remitted the proceeds of sales of defendant's products to defendant at the close of each day's business, but was allowed to retain two cents for every gallon of gasoline sold, to apply against the full commission of 4.6¢ and 5.16¢ per gallon on regular and premium gasoline respectively.

In addition to the investment in working capital plaintiff claims a substantial investment in hand tools which were necessary for the auto mechanical service business which he was allowed to conduct on his own account at the service station under certain regulations and controls of prices charged by the defendant. Plaintiff also recites certain other elements of responsibility imposed on him under the agreement, the principal one of which is the hiring and payment of compensation of employees. His responsibilities also included the payment for insurance protection for his operations, including coverage of liabilities of the defendant

arising thereunder, the paying for utility services under the first agreement which was shifted to defendant under the second agreement, the risk of loss for theft or employees' negligence which was later shifted to defendant under the second agreement and the like. The sum total of the evidentiary material argued by plaintiff in support of his contention that he was an independent businessman was that the plan imposed upon the plaintiff large risks and substantial managerial responsibilities which removed him from the status of an employee and constituted him an independent businessman.

On the other hand, the defendant claims that the arrangement under the Commission Manager Agreement constituted plaintiff an employee. Defendant cites the extensive control exercised by defendant over plaintiff's operation at the station, the extent of defendant's supervision over plaintiff to insure that he followed defendant's directives, the defendant's control of all major business decisions, the defendant's power to dismiss plaintiff at any time without cause, the fact that the major capital investment in the business enterprise was constituted by defendant's ownership of the gasoline station real estate and the major equipment installed therein, and that the risk of business competition in retail prices was borne by the defendant, the plaintiff receiving his commission on sales measured by the quantity of gasoline sold without regard to market price variations.

Both parties have indulged in an extensive recital of the presence or absence of indicia of status as an employee as opposed to that of an independent retailer. All of these indicia are not of equal weight in determining whether their relationship constituted a conspiracy to violate the antitrust laws. The indicia of status which may serve to impose vicarious liability on an employer for the negligent act of an

alleged servant are not the same elements which should be controlling in a consideration of application of the antitrust laws.

Again, we return to *Simpson v. Union Oil Co. of Cal.*, cit. supra, in connection with the tying agreement allegations of this case. The Court there examined the consignment sale agreement for the purpose of determining whether the agreement achieved a scheme of illegal price maintenance. The difficulty with the application of *Simpson* to the facts of the present case is that in *Simpson* the Court began its inquiry with the assumption that Simpson was an independent dealer. The Court then proceeded to inquire whether the form of the consignment agreement and the attendant circumstances were so coercive that they deprived independent dealers of the exercise of free judgment as to whether to become consignees at all, or to remain consignees, and ultimately deprived the independent dealers of free judgment to sell gasoline at competitive prices. The Court concluded that agreement had the proscribed anti-competitive effect and that to allow the defendant Union Oil Company to achieve a price fixing scheme over a vast area covered by its distribution system by means of this consignment device would be to make the scheme's legality for antitrust purposes turn on clever draftmanship.

[5] Our consideration of *Simpson* leads us to conclude that the body of law developed by the line of master and servant cases from the state courts is of limited value in determining the master-servant issue in the price-fixing count of the instant case. The state cases are determined by the degree of control exercised by the master; if the master has the right to control not only the result of the work but also the way in which it will be accomplished, the relationship is one of employment. On the other hand, if the party engaged to do the work has the exclusive control of the manner of

performing it, being responsible only for the result, then the performing party is held to be an independent contractor. This is the common law test as recognized in Singer Manufacturing Co. v. Rahn, 132 U.S. 518, 10 S. Ct. 175, 33 L.Ed. 440 [1889]. Both parties have pointed to abundant examples arising out of the instant commission manager agreement of the amount of supervision and control exercised by the defendant, as well as the individual responsibility placed upon the manager. It may be summarized by the statement that much responsibility was imposed upon the manager in the conduct of his station but that he was closely and extensively supervised by the defendant in almost every aspect of his performance of these duties. To the extent that the plaintiff was permitted to conduct his own business of mechanical service and repairs on the premises of defendant's gasoline station, the plaintiff exercised considerable independent responsibility, furnished his own hand tools and generally was unsupervised in the method in which he performed these services. However, the extent of the services which the plaintiff could offer and the prices which he charged for these services were under the control of the defendant. It is possible that under these circumstances the defendant would not be held vicariously liable for an act of negligence on the part of plaintiff in performing certain repair services whereas the defendant would be held liable for an act of negligence of the plaintiff in dispensing gasoline. We conclude, therefore, that the extent of control exercised by defendant over plaintiff in the operation of the gasoline station is not a factor to be accorded much weight in determining the existence of a conspiracy to fix prices in restraint of trade.

The gravamen of plaintiff's complaint with respect to the anti-trust violation of price fixing is directed to the sale of defendant's products in the gasoline station. Therefore, we

focus attention on the aspects of the agreement and the conduct of the parties with respect to the sale of gasoline and the allied products and accessories supplied by the defendant for sale on the gasoline station premises.

There is no dispute that defendant established the prices at which all these products were to be sold. It is also established that the plaintiff's compensation for the sale of gasoline was not related to the retail price at which said gasoline was sold because the plaintiff was compensated on a fixed rate per gallon of gasoline dispensed. On the auxiliary products and accessories, however, the plaintiff was compensated on a percentage of retail sales prices.

It appears, however, that the sale of gasoline produced the substantial majority of the gross income received by the defendant from the operation of this station.

With respect to the sale of gasoline the plaintiff was not obliged to receive and distribute any particular amount in any given period of time. His inventory of gasoline and allied products would be restocked by the defendant upon the call of the plaintiff.

[6] The plaintiff's only risk from price competition was that he might suffer a diminution in the quantity of gasoline sold from his station and hence a lessening of his fixed gallon commission, but the ordinary risk of the market was not placed upon him. The plaintiff was placed in a position of responsibility for risk of loss for shortages and employees' negligence under the original agreement but these risks were shifted to the defendant in the second agreement. Therefore, in the distribution of gasoline and allied products and accessories there is little evidence to substantiate the contention that the plaintiff is an independent dealer bound to a seller of gasoline by an agreement whose principal purpose is to restrain competition by fixing the prices at

which the product should be sold. If in the sale of gasoline under the Commission Manager Plan the defendant company retains in its own hands the absolute price at which gasoline and related products are to be sold by those employed by it and the defendant continues to bear the major risks of the market place from that policy, we cannot find that the within contract is an agreement in restraint of trade by two independent parties engaged in that trade. The agreement is in no way coercive upon the individual operating the gasoline station; he is not bound to continue in that location by reason of a lease; he is not bound to continue the employment relationship which is one of employment at will of either party; he is not bound to buy a particular product in consideration of being allowed to purchase another product; he is in all senses for the purpose of distributing defendant's gasoline and related products an employee of the defendant producing company.

The plaintiff has recited a number of situations where the investment and the financial risk are imposed upon the plaintiff. The initial working capital requirement and the requirement of a continued working capital are present, but they are not disproportionate to the employment opportunity offered. The plaintiff is supplied with the premises free of an obligation to pay rent. The plaintiff must pay the expenses of keeping the location in operation although the second agreement shifts some of these expenses, i.e., utilities, to the defendant. Except for the two cents per gallon he is allowed to deduct immediately from the proceeds remitted daily to the company, the plaintiff is himself responsible for payment of his own wages and the wages of any employees he engages.

But the plaintiff is provided with premises and with the heavy equipment with which he may conduct mechanical service operations for his own account. He thus enjoys the

benefits of defendant's investment in the location and the heavy equipment without substantial financial risk to himself, except for his investment in his hand tools. Under all of the circumstances we hold that the indicia of capital investment and risk of loss do not indicate that plaintiff must be considered an independent contractor. The working capital investment and the risks of loss which plaintiff must assume under the Commission Manager Agreement are not incompatible with a contract of employment.

PLAINTIFF'S COUNT II

Plaintiff's Count II of the complaint is based upon a contention that under the applicable law of the state the contract between the parties was unconscionable and, therefore, void, and that the plaintiff's termination was unfair, without cause and therefore illegal. Jurisdiction is based on diversity of citizenship. Although this count also involves determination of plaintiff's employment status it requires a consideration of elements other than those considered in determining plaintiff's status under the antitrust laws. The defendant asserts that plaintiff can only allege the cause of action in Count II on the assumption that plaintiff was an employee of defendant and that the same considerations must be viewed in determining his employment as were made in considering the existence of an agreement or conspiracy between independent parties under the Sec. 1 Sherman Act price fixing violation alleged in Count I. We think other criteria are also to be viewed for the purpose of determining plaintiff's status under Count II of the complaint. In Count I we searched for the antitrust effect of the agreement; in Count II we are concerned with the effect of the agreement between the parties. Plaintiff resists the defendant's allegation that the relationship of employer and employee must be assumed for the purpose of Count II because defendant argues that the relationship between the

parties was that of a joint venture which requires the application of fiduciary standards to determine the effect of relations between them.

Plaintiff's argument, and the evidentiary materials that he has produced and cited in support of it, is that the amount of initial and continuing monetary investment in the enterprise by the plaintiff and the risks that he assumed in the operation removed him from the category of an employee to that of a joint venture. We have given some weight to these arguments for the purpose of determining the plaintiff's status under the price fixing allegation in Count I but we are now concerned with viewing the same evidence not from the point of view of the antitrust implications of their relationship but rather the common law indicia of the agreement between them.

Plaintiff argues that the parties were engaged in a common enterprise for mutual profit. We cannot find this argument sufficient to establish a joint enterprise because all contracts of employment, and in fact all commercial transactions, involve the same ultimate expectation. Plaintiff advances the joint enterprise theory because of the doctrine that a joint enterprise cannot be terminated by either party except for good cause. The good cause argument has also been raised in Count III of the plaintiff's complaint. We will consider the nature of the good cause requirement in our discussion of Count III of the complaint but its injection into Count II of the complaint depends upon a finding of a joint venture.

[7] We have found no case authority either state or federal which converts an employer-employee relationship established as such in a written agreement to a joint venture on the grounds of the allocation of the alleged employee's investment or the sharing of risks between them. The plaintiff has cited one case from New Jersey involving an

independent gasoline dealer operating under a franchise agreement with a separate written agreement for the lease of the station premises. A termination of the franchise agreement and a cancellation of the lease was resisted by the operator on the grounds that the reasons given by the oil company did not constitute good cause in that the grounds given did not demonstrate the failure of the dealer to substantially comply with his obligations under the lease and dealer agreement. Involved in Shell Oil Company v. Marinello, 63 N.J. 402, 307 A.2d 598 [1973], was the statutory policy of the state of New Jersey expressed in its Franchise Practices Act. Under that statute good cuase was a requirement for any cancellation of a franchise. The existence of a lease coterminous with the franchise was an added element in that case. There is no similar statutory provision in Pennsylvania whose law controls the interpretation of the present contract and under the Pennsylvania Uniform Commercial Code, Sec. 2—309(2), in the absence of any controlling contractual provision, agreements calling for successive performance may be terminated by either party without cause.

[8] Thus, we can find no authority for construing the present agreement which on its face constitutes a contract of employment into that of a joint venture so that its provision for termination became subordinate to an independent determination of good cause. Nothing in this contract or nothing in the controlling law applicable to the contract limits the rights of termination given to either party by the express language of the contract.

Summary judgment on Count II must be rendered for the defendant.

PLAINTIFF'S COUNT III

Plaintiff's allegation in Count III of the complaint is also asserted under diversity jurisdiciton and involves a question

of state law in the interpretation of the agreement between the parties. In brief it recites that defendant terminated its relationship with the plaintiff because of his failure to be open for business on Christmas Day 1971, contrary to the orders of the company. The agreement in effect at the time of termination was the agreement made May 1, 1969. It provides:

> "8. Termination.
>
> A. This Agreement and Manager's employment hereunder may be terminated without cause by either Boron or Manager at any time upon not less than two (2) weeks' prior notice given to the other party."

Section (B) of clause 8 provides for termination of the agreement by Boron without notice for certain causes recited therein. These are not material to our present consideration because it is not disputed here that the defendant gave the two weeks' notice required by Section (A) for termination without cause.

Plaintiff's contention that the termination is void and without cause again relies on assertion that the contract under consideration was not a contract of employment but one which established him as an independent contractor. The defendant asserts that it is a contract of employment and is governed by the well-established principle of law that a contract of employment without a definite term is a contract for employment at will which permits of discharge at any time in the absence of specific provisions to the contrary.

As in Count II, so also in Count III, we examine the indicial of the relationship between the parties from the point of view of general common law principles for determining the relationship of master and servant and individual contractors. We are not limited to those indicia that are of importance in determining the antitrust effect of

the relationship between the parties. Here we begin with a written contract of employment which states the relationship as that of employer and employee. One of the controlling qualities of a contract establishing the relationship of employer and employee is the right of the parties to terminate the relationship at will.

> "[A]n extremely important consideration is the power of the master to terminate the relationship at any time with or without cause, since that tends strongly to show that the person employed is not an independent contractor but a servant." Feller v. New Amsterdam Cas. Co., 363 Pa. 483, 487, 70 A.2d 299, 301]1950].

and

> "[T]he power of an employer to terminate the employment at any time is incompatible with the full control of the work which is usually enjoyed by an independent contractor, and hence is considered as a strong circumstance tending to show the subserviency of the employee." Blum Unemployment Compensation Case, 163 P.Super. 271, 276, 60 A.2d 568, 570 [1948].

Not only does the understanding of the parties as they set it forth in the written contract between themselves provide for termination without cause which is a strong indicator of the nature of the relationship between them but also the contract itself is cast in the terms of an employer-employee relationship. The Restatement of the Law, Agency 2d, 220(2)(i) sets forth as a factor to be considered in determining the relationship;

> "(i) whether or not the parties believe they are creating the relation of master and servant;".

However, we are dealing with a contract between the parties which provides that it may be terminated by either party upon notice. It is undisputed that the notice was given

for the time required. We conclude that it is immaterial whether we determine this to be a contract of employment or a franchise agreement constituting an independent contractor's status. The express terms of the contract in either event provide for termination. There are no elements here such as a lease for the premises for a stated term which would restrict either party's absolute right to terminate at any time upon notice. Therefore, whether we label this as a contract of employment or a contract for an independent dealership is immaterial to the disposition of Count III of the complaint.

[9] The general rule governing such contracts in Pennsylvania is stated as follows:

> "The general rule is that when a contract provided that one party shall render services to another, or shall act as an agent, or shall have exclusive sales rights within certain territory, but does not specify a definite time or prescribe conditions which shall determine the duration of the relation, the contract may be terminated by either party at will." Cummings v. Kelling Nut Co., 368 Pa. 448, 451, 84 A.2d 323, 325 [1951].

If this is a contract of hiring the law is clear that unless otherwise specified it is terminable at will by either party regardless of cause. See Fawcett v. Monongahela Ry. Co., 391 Pa. 134, 139; 137 A.2d 768 [1958]; Trainer v. Laird, 320 Pa. 414, 183 A. 40 [1936], but whether it is labeled a contract of employment or one creating an independent relationship is immaterial because the express terms of the contract provided for its own termination and no facts in this case support any rule of law which would place a limitation on such right of termination at any time. In view of these facts we believe that it is unnecessary to consider the additional undisputed fact that the defendant relied upon a specific refusal of the plaintiff to follow orders as a cause for this

dismissal. We do not find any cause necessary under the law and the terms of this agreement, but were we to so inquire the cause has been stated and would in our minds satisfy any requirement of cause under the circumstances of this case.

[10] Therefore, under Count III of the complaint we find that the plaintiff fails to state a cause of action and that Summary Judgment must be granted for defendant.

Finally, in view of the evidentiary matters presented, we must establish the power of this court to determine the above questions under Fed.R.Civ.P. 56 as a summary judgment.

[11,12] We recognize that where a case depends on the resolution of conflicting inferences of fact which may be drawn from undisputed terms of a writing summary judgment is improper. See, e.g., Aetna Casualty & Surety Co. v. Giesow, 412 F.2d 468 [2nd Cir. 1969] and Lemelson v. Ideal Toy Corp., 408 F.2d 860 [2nd Cir. 1969]. We also recognize that summary judgment is inappropriate where motive and intent are important or where credibility is a factor. United States v. Beatrice Foods Co., 344 F.Supp. 104 [D.C.Minn.1972], supplemented 351 F.Supp. 969.

Although a jury trial was demanded in plaintiff's complaint both parties have moved for summary judgment on all counts, and both have submitted extensive evidentiary matter in the form of depositions, affidavits and documents. The court has had the benefit of evidence to the same extent that it would in a plenary trial of the issue except for the actual production of witnesses before it. However, no question of credibility has been raised with respect to the depositions of oral testimony. Some objection has been noted as to the lack of proof of authentication of certain documents, but not as to the essential documents, the agreements upon which the suit is based.

[13] In none of the counts in the instant complaint are intent or credibility in question. The price-fixing and tying agreement allegations of Count I depend entirely on the terms of the Commission Manager Agreement and not on questions of relevent product line, intent to monopolize or the like. The question of plaintiff's status in Counts II and III is also for the court. Where the facts are not in dispute the issue of whether the employer-employee relationship exists may be determined as a matter of law. McGrath v. Edward G. Budd Mfg. Co., 348 Pa. 619, 36 A.2d 303 [1944]

[14] While the counsel have argued different conclusions from the evidentiary material we do not believe that this creates a material issue of fact. The court is faced with the interpretation of a written contract which is clear and unambiguous as to its terms. The conflicitng conclusions argued are to its antitrust effect and to the nature of the relationship between the parties. See Allen-Bradley Co. v. Air Reduction Co. Inc., 273 F.Supp. 930 [W.D.Pa.1967], aff'd p. c. 391 F.2d 282 [3rd Cir. 1968].

[15-17] Our holding on each of the three counts of the Complaint rests on our construction of the Commission Manager Agreements. The cases indicate that the construction and the legal effect of an unambiguous writing is for the court and not for a jury. Holmes v. Chartiers Oil Co., 138 Pa. 546, 21 A. 231 [1891]; Rhoads v. Rhoads, 126 Pa.Super. 141, 190 A. 533 [1937]; United States v. Manufacturers Casualty Ins. Co., 158 F.Supp. 319 [D.C.N.Y.1957]. Summary judgment is properly used for interpreting a contract whose terms are considered by opposing parties to be clear and unambiguous, despite the parties' divergent views of what the agreement provided. Green v. Valve Corp. of America, 428 F.2d 342 [7th Cir. 1970]; Trans-Fuel, Inc. v. Saylor, 440 Pa. 51, 269 A.2d 718 [1970]. Summary judgment, if otherwise justified, is clearly proper in antitrust cases. Lee National

Corp. v. Atlantic Richfield Co., 308 F.Supp. 1041 [D.C.Pa.1970] United States v. Krasnov, 143 F.Supp. 184 [D.C.Pa. 1956], aff'd. 355 U.S. 5, 78 S.Ct. 34, 2L.Ed.2d 21 [1957]; Crest Auto Supplies, Inc. v. Ero Mfg. Co., 360 F.2d 896 [7th Cir. 1966]; Ingram v. Phillips Petroleum Co., 252 F.Supp. 674 [D.C.N.M.1966]

ORDER

AND Now this *6th day of May, 1974*, the within matter having come before the court on cross-motions of the parties for Summary Judgment and the court having reviewed the motions, the evidentiary matters presented and the briefs and arguments of the parties, the court finds that there is no genuine issue as to any material fact and that judgment ought to be rendered as a matter of law.

It is, therefore, ORDERED that the Motions of Plaintiff for Summary Judgment be DENIED, and the Motion of Defendant for Summary Judgment be GRANTED as to each count of Plaintiff's Complaint, and that JUDGMENT be and hereby is ENTERED for DEFENDANT.

/s/ GERALD J. WEBER
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1712

RICHARD J. GOLDINGER,
Appellant,

v.

BORON OIL COMPANY,
Appellee.

Appeal From the United States District Court
For the Western District of Pennsylvania

Argued February 25, 1975

Before VAN DUSEN, GIBBONS and HUNTER, *Circuit Judges*

PAUL H. TITUS
BERNARD D. MARCUS
KAUFMAN & HARRIS

WILLIAM C. O'NEIL
MICHAEL YUKEVICH, JR.
KEITH H. WEST
THORP, REED & ARMSTRONG

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.[1]

Costs taxed against appellant.

By the Court,

.....
James Hunter, III, *Circuit Judge*

Date: March 7, 1975

Attest:

.....
Thomas F. Quinn, Clerk

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[1]See Judge Weber's opinion at 375 F.Supp. 400 (W. D. Pa., 1974).

APPENDIX C

BORON OIL COMPANY **Site No. P-184**
COMMISSION MANAGER AGREEMENT

effective . . . . August 8, 1966

This AGREEMENT, made *May 26*, 1966, between BORON OIL COMPANY ("Boron"), whose address is *1120 Perry Highway, Pittsburgh, Penna. 15237*, and *Richard J. Goldinger CM-6810* ("Manager"), whose address is *1330 Kenson Dr., Allison Park, Penna. 15101*,

WITNESSETH:

That Boron and Manager have agreed as follows:

1. Employment.

Boron hereby employs Manager to operate Boron's gasoline service station (the "Station"), located at *(Route 8 and Duncan) 3915 Wm. Flynn Highway, Allison Park, Penna. 15101*, including the equipment as listed on the attached "Equipment Schedule", and Manager hereby accepts such employment on the terms and conditions herein set forth.

2. Stocked Products.

A. Boron will deliver to the Station "Stocked Products" consisting of motor fuels, motor oils and such other products and merchandise as Boron shall from time to time elect, in such quantities as shall in Boron's judgment be reasonably necessary to meet customer demand therefore. Title to all Stocked Products shall remain in Boron until sold.

B. All sales of Stocked Products shall be at retail prices from time to time established by Boron. Manager agrees to segregate and hold the proceeds of such sales as the property of Boron, in trust for it, separate and apart from any other funds in his possession, and to account for and deliver such

proceeds to Boron in such manner and at such place as Boron may from time to time designate. Manager will use and give such premiums, discounts, stamps or other promotions in the sale of Stocked Products as Boron may from time to time direct.

3. Purchased Products and Station Services.

Manager shall have the right for his own account (i) to purchase from others such products and merchandise other than Stocked Products as Boron may approve for resale at the Station ("Purchased Products"), and (ii) to perform such Services for customers at the Station and at such prices as Boron may approve. All proceeds from the sale of such Purchased Products and all receipts from such Services shall belong to and be retained by Manager.

4. Compensation.

A. Boron will pay Manager as compensation hereunder commissions on sales of Stocked Products, as follows:

(i) Motor Fuels: The commission per gallon on sales of motor fuels will be an amount equal to the difference between the retail price per gallon at the Station and Boron's Dealer Tank Wagon price per gallon for such motor fuel in effect at the time of sale in the area where the Station is located, less one and six-tenths cents (1.6¢).

(ii) Commissions on other products will be computed on the retail prices thereof (exclusive of taxes) in effect at the time of sale, as follows:

	Commission
Motor Oils	45 %
Tires	19.5%
Batteries	28 %
Accessories	
Group I	42 %
Other	42 %
Antifreeze	35 %

B. Boron shall have the right to change commission rates payable to Manager on the sale of any Stocked Products from time to time. Boron reserves the right, without payment of any commission thereon to Manager, to conduct or permit third parties to conduct any business at the Station, including but not limited to installation and operation of vending machines, which does not materially interfere with the gasoline service station business conducted thereon.

5. Operation.

A. Manager will devote his full business time to the operation of the Station and will follow and comply with the operating practices, instructions, rules and regulations prescribed by Boron.

B. Manager will hire and will pay all wages and compensation of such personnel as Boron may deem necessary to assist Manager in the proper operation of the Station. Manager agrees that all such personnel shall be subject to approval by Boron when hired and to discharge at Boron's request. Manager will be responsible for the acts and omissions of such personnel and will withhold and pay over to Boron all monies and contributions that either Boron or Manager is or may be required by law to withhold as to the wages or compensation of such personnel.

C. Manager will pay the cost of all utilities used in the Station operation, except electricity the cost of which will be borne by Boron. Manager will also furnish at his own expense all supplies and miscellaneous equipment required in the operation of the Station not furnished by Boron, including uniforms, approved by Boron, for himself and the Station personnel.

D. Manager agrees to reimburse Boron for any loss, damage or destruction of the Station or equipment resulting from the negligent act or omission of Manager or Station personnel. Manager further agrees to be solely responsible

and pay for all shortages or losses of monies, Stocked Products (except in cases resulting from the failure of Boron equipment), Purchased Products and property of Manager or Station personnel which are lost, damaged, destroyed or stolen.

E. Manager will obtain at his own expense all licenses and permits required for the sale of Purchased Products or of Services for his own account, and will pay all taxes and fees with respect to such sales.

F. Manager will have no authority to make any commitments in the name or on behalf of Boron; and any unauthorized extension of credit by Manager will be for the account and at the risk of Manager.

6. Insurance; Indemnity; Fidelity Bond.

Manager will carry at his own expense automotive public liability insurance for bodily injury and property damage covering such automotive equipment as Manager or any Station personnel may use in the operation of the Station, with limits in the minimum amount of $10,000 per accident for property damage and $50,000/$100,000 per person for bodily injury or death from any accident, which policies of insurance will jointly protect Manager and Boron. Manager agrees from time to time on request to furnish appropriate evidence to Boron that such insurance coverage is being maintained. In the event Boron elects to purchase a fidelity bond covering the Manager or any Station personnel, Manager agrees to furnish such information and execute such instruments as may be required for that purpose.

7. Termination.

A. This Agreement may be terminated at any time by either Boron or Manager upon not less than twenty-four (24) hours prior notice given by the party so terminating to the other party.

B. If Manager (i) fails to account for the proceeds of any sale of Stocked Products, (ii) commits or allows any act which jeopardizes any permit or license issued in connection with the use or operation of the Station or of any station facilities or equipment, (iii) ceases for any reason to operate the service station business, or (iv) becomes insolvent or a petition of bankruptcy or for receivership is filed by or against Manager, then in any such case, and in addition to any other legal remedies available to it, Boron may terminate this Agreement without notice and forthwith enter upon and take possession of the Station, the Stocked Products and equipment. Upon any termination of this Agreement Manager will vacate the Station, return to Boron the Stocked Products and all of its property and equipment, and will pay over to Boron all proceeds of sales of Stocked Products not theretofore accounted for.

8. Agreement Personal; Entirety; Waiver; Severability.

This Agreement is personal and not assignable by Manager; it represents the entire agreement between Boron and Manager, superseding all other promises, understandings or agreements with respect to the Station or its operation. Neither this Agreement nor any amendment thereof, or supplement thereto, shall be binding upon Boron unless and until it is signed by a duly authorized representative of Boron. The waiver of any default or breach by Manager hereunder, forbearance or failure to insist upon strict performance of any of the terms or provisions hereof or prior course of dealing on the part of Boron shall not be taken to be a waiver of any continuing or subsequent default or breach of the same or any other term or provision hereof, or affect the rights or remedies of Boron with respect thereto. Should any of the provisions contained in this Agreement now be or hereafter become illegal and unenforceable, this Agreement shall nevertheless remain in full force and effect as to all of the remaining provisions

contained herein, but such illegal or unenforceable provisions shall for all purposes be regarded as eliminated herefrom.

9. Notices; Headings.

Any notice provided for herein shall be given in writing and shall be considered properly given as of the date mailed if and when deposited in the United States mail, postage prepaid, properly addressed by either party to the other at the address shown for such party hereinabove, or at such other address as either party shall have theretofore furnished to the other in writing. The headings in this Agreement are for reference only and shall in no way limit, define, or otherwise affect any of the terms and provisions hereof.

IN WITNESS WHEREOF, this Agreement has been executed on the date first above written.

Witnesses:

/s/.....

.....

/s/RICHARD J. GOLDINGER
Manager
BORON OIL
COMPANY

By: /s/. J. L. KNOTTS

BORON OIL COMPANY **P-184**
COMMISSION MANAGER AGREEMENT

This AGREEMENT, made May 1, 1969, between BORON OIL COMPANY ("Boron"), whose address is the Midland Building, Cleveland, Ohio 44115, and *Richard J. Goldinger CM6810* ("Manager"), whose address is *4330 Kenson Drive, Allison Park, Pa. 15101*

WITNESSETH:

That Boron and Manager have agreed as follows:

1. Employment.

Boron hereby employs Manager to operate the Boron gasoline service station (the "Station") located at *Route 8 & Duncan) 3915 Wm. Flynn Highway, Allson Park, Pa. 15101* and Boron will furnish without charge (except as otherwise specified thereon) the equipment listed on the "Equipment Schedule" on the reverse side hereof, and Manager hereby accepts such employment on the terms and conditions herein set forth.

2. Stocked Products.

A. Boron will deliver to the Station "Stocked Products" which are herein defined to mean motor fuels, motor oils, tires, batteries, accessories and such other products and merchandise as Boron shall from time to time offer for sale at the Station and in such quantities as in the judgment of Boron shall be reasonably necessary to meet customer demand. Title to all Stocked Products shall remain in Boron until sold.

B. All sales of Stocked Products shall be at retail prices from time to time established by Boron. Manager agrees to segregate and hold the proceeds of such sales as the property of Boron in trust for it, separate and apart from any funds in his possession, and at his own expense to account for and deliver such proceeds to Boron in such

manner and at such place as Boron shall from time to time designate. Manager will use and give such premiums, discounts, stamps or other promotions in the sale of Stocked Products as Boron may from time to time direct.

3. Purchased Products and Customer Services.

Manager shall have the right for his own account (i) to purchase from others for resale at the Station "Purchased Products" which are herein defined to mean such products and merchandise other than Stocked Products as Boron may approve, and (ii) to perform "Customer Services" which are herein defined to mean such services as Boron may from time to time specify in its "Price Guide", all such Customer Services to be performed at the prices therein specified. All proceeds from the sale of such Purchased Products and all receipts from such Customer Services shall belong to and be retained by Manager.

4. Compensation.

A. Boron will pay Manager as compensation hereunder commissions on sales of Stocked Products, as follows:

(i) Motor Fuels: The commission per gallon on sales of motor fuels will be:

Boron	5.1 cents per gallon
Extron	4.6 cents per gallon

(ii) Commissions on other products will be computed on the retail prices thereof (exclusive of taxes) in effect at the time of sale, as follows:

	Commission
Motor Oils	41%
Tire	21%
Batteries	28%
Accessories	42%
Antifreeze	35%

B. Boron shall from time to time review commission rates payable to Manager on the sale of Stocked Products and shall have the right to change any or all such rates upon not less than fourteen (14) days' prior notice to Manager, provided that after this Agreement has been in effect for three (3) months or more no change of any commission rate shall be made without Manager's consent unless such rate has been in effect for at least (3) months. Boron reserves the right without payment of any commission thereon to Manager, to conduct or permit third parties to conduct any business at the station, including but not limited to installation and operation of vending machines, which does not materially interfere with the gasoline service station business conducted thereon.

5. Operation.

A. Manager will devote his full business time to the operation of the Station and will follow and comply with the operating practices, instructions, rules and regulations prescribed by Boron.

B. Manager will hire such employees ("Station personnel") as Boron may deem necessary to assist him in the proper operation of the Station. Manager will at his sole expense pay all wages and compensation of such Station personnel which shall be established and paid in compliance with applicable federal and state laws. Manager will obtain Boron's approval of all Station personnel hired and will discharge any of them if requested to do so by Boron. Manager will be responsible for the acts and omissions of such Station personnel and will withhold, collect and pay over to Boron all taxes, monies and contributions required by law of any employer to be withheld, collected or paid with respect to the rates, compensation or employment of such Station personnel.

C. Boron agrees to pay the cost of the following utilities:

Electricity, Heat, Water-Sewage, and
Pay Telephone — Tax and Guarantee

All other utilities, or portions of utilities not paid by Boron, will be paid for by the Manager. Manager will furnish at his own expense all supplies and miscellaneous equipment not furnished by Boron (including the official Boron uniform for himself and the Station personnel) required in the operation of the Station.

D. Manager agrees to reimburse Boron for any loss, damage or destruction of the Station or equipment caused by his negligence or that of any Station personnel. Manager further agrees, except as hereinafter specified, to be solely responsible and to reimburse Boron for all shortages or losses of monies and of Stocked Products howsoever caused, whether by theft, spillage, evaporation or otherwise, in excess of shortage allowances from time to time established by Boron; provided, however, that Manager shall not be liable for shortages or losses of monies or Stocked Products resulting from identifiable theft or acts of third parties, riots, fire, flood, windstorm, acts of God, or the failure of any Boron equipment. Manager assumes and agrees to bear all risk of loss or damage to Purchased Products and property of Manager or Station personnel.

E. Manager will obtain at his own expense all licenses and permits required for the sale of Purchased Products or of Customer Services for his own account, and will pay all taxes and fees with respect to such sales. Manager assumes sole responsibility for the sale of Purchased Products and the performance of Customer Services at the Station and Manager agrees to indemnify and save Boron harmless from and against all claims, suits, damages, liability, losses, judgments, costs and expense

for damage or destruction of property and/or for injury to or death of persons resulting from or connected with the sale of Purchased Products.

F. Manager will have no authority to make any commitments in the name or on behalf of Boron and any authorized extension of credit by Manager will be for the account and at the risk of Manager.

G. All sales and other records maintained or generated by Manager in the operation of the Station shall be deemed to be the property of Boron and available at all times for inspection, copy or audit by Boron.

6. Insurance; Customer Claims; Fidelity Bond.

Manager will carry at his own expense Garage Liability Insurance including Garagekeeper's Legal Liability coverage with $50 deductible and including coverage of automotive equipment of Manager and Station personnel used in connection with operation of the Station, with limits of not less than $10,000 per accident for property damage and $50,000/$100,000 per person/accident for bodily injury or death. Such policies of insurance shall be in form and issued by a company satisfactory to Boron, shall protect both Manager and Boron as co-insureds, shall include a contractual liability endorsement covering Manager's indemnity obligations under this Agreement, and shall provide that coverage will not be altered or terminated without at least ten (10) days' advance notice to Boron. Manager will at the commencement of this Agreement and thereafter annually on the anniversary date hereof furnish appropriate evidence to Boron that such insurance is being maintained. Settlement of customer claims arising out of the operation of the Station shall be under the direction and control of Boron except in the case of customer claims resulting from or connected with the sale of Purchased Products or the performance of Customer Services. In the event Boron elects to purchase a fidelity bond covering the Manager or any Station personnel, Manager agrees to furnish such information and execute such instruments as may be required for that purpose.

7. Security Deposit.

Upon execution of this Agreement Manager will deposit with Boron the sum of $none as a security deposit for the full and faithful performance of all Manager's obligations hereunder. Upon any termination of this Agreement such security deposit shall be returned by Boron to Manager without interest, less any amounts then due Boron by reason of any default on the part of Manager hereunder.

8. Termination.

A. This Agreement and Manager's employment hereunder may be terminated without cause by either Boron or Manager at any time upon not less than two (2) weeks' prior notice given to the other party.

B. If Manager (i) fails to account for the proceeds of any sale of Stocked Products, (ii) commits or allows any act which jeopardizes any permit or license issued in connection with the use or operation of the Station or any station facilities or equipment, (iii) ceases for any reason to operate the service station business, (iv) becomes insolvent or a petition of bankruptcy or for receivership if filed by or against Manager, or (v) breaches any of the provisions hereof, then in any such case, and in addition to any other legal remedies available to it, Boron may terminate this Agreement without notice and forthwith enter upon and take possession of the Station, the Stocked Products and equipment. Upon any termination of this Agreement Manager will vacate the Station, return to Boron the Stocked Products and all of its property and equipment, and will pay over to Boron all proceeds of sales of Stocked Products not theretofore accounted for.

9. Agreement Personal; Entirety; Waiver; Severability.

The Agreement is personal and not assignable by Manager; it represents the entire agreement between Boron and Manager, superseding all other promises, understandings or agreements with respect to the Station or its operation. Neither this Agreement nor any amendment thereof, or supplement thereto, shall be binding upon Boron unless and until it is signed by a duly authorized representative of Boron. The waiver of any default or breach by Manager hereunder, forbearance or failure to insist upon strict performance of any of the terms or provisions hereof or prior course of dealing on the part of Boron shall not be taken to be a waiver of any continuing or subsequent default of breach of the same or any other term or provision hereof, or affect the rights or remedies of Boron with respect thereto. Should any of the provisions contained in this Agreement now be or hereafter become illegal and unenforceable, this Agreement shall nevertheless remain in full force and effect as to all of the remaining provisions contained herein, but such illegal or unenforceable provisions shall for all purposes be regarded as eliminated herefrom.

10. Notices; Headings.

Any notice provided for herein shall be given in writing and shall be considered properly given as of the date mailed if and when deposited in the United States mail, postage prepaid, properly addressed by either party to the other at the address shown for such party hereinabove, or at such other address as either party shall have theretofore furnished to the other in writing. The headings in this Agreement are for reference only and shall in no way limit, define, or otherwise affect any of the terms and provisions hereof.

IN WITNESS WHEREOF, this Agreement has been executed on the date first above written.

Witnesses:

/s/ KENNETH F. FISHER

/s/ A. B. LANDEFELD

/s/ RICHARD J. GOLDINGER
Manager

BORON OIL COMPANY

By /s/ J. E. MCKINNIE